

BACKGROUND

The State of Washington, hereinafter referred to as the Employer and the Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement covering several State Agencies, including the Department of Social and Health Services. The Agreement in effect when the grievance arose covered the years 2013-2015.

One of the facilities operated by the Employer is an Adult Psychiatric Hospital known as the Western State Hospital. Its mission is to promote recovery, while protecting the public and its patients. It employs security guards for that purpose. Grievant was a security guard at the facility for eight years prior to his discharge. He had a clean disciplinary record during the time he was employed. He was assigned to the Court System at the time of the discharge. His job was to escort patients from the Hospital to the Court and back whenever a patient's presence was required by the Court. He worked with one other guard, Jacquie Doss.

Security Guards need to utilize the State owned computers as part of their job. It is on the State-wide DHS system. The Department has promulgated rules regarding the personal use of those computers. The employees are allowed to use those computers for their own personal purposes with limitations. It is must brief and cannot interfere with the employee's regular duties. There can be no cost to the Employer, it cannot interfere with the business needs of others and it cannot compromise the "security or integrity of state information, computer equipment or software."¹

¹ Administrative Policy 15.15 C(2)

The same policy also limits the sites which can be accessed on the State computers. Employees are prohibited from viewing Pornographic or Sexually Explicit material. Those terms are defined in the policy:

Pornographic Materials: The explicit representation of the human body or sexual activity with the goal of sexual arousal and/or sexual relief. These materials connote the more direct, blunt, or excessive depiction of sexual acts, with little or no artistic value, intended for mere entertainment.

Sexually Explicit Materials: Video, photography, creative writing, films, magazines, or other materials intended primarily to arouse sexual desire or cause sexual arousal.

Section E warns employee of disciplinary action for “noncompliance” of the policies set forth in Policy 15.15. It states in pertinent part:

2. Pornographic Materials: DSHS has a zero tolerance regarding pornographic material in the workplace. If an investigation determines an employee used state resources to create, access, post, transmit, print or store pornographic materials not appropriate for the workplace, the most stringent disciplinary action will be taken.

3. Sexually Explicit Materials: If an investigation determines an employee used state resources to create, access, post, transmit, print or store sexually explicit materials not appropriate for the workplace, appropriate disciplinary action will be taken, up to and including termination from DSHS employment. The administration’s highest-level appointing authority will consult with the Senior Director of DSHS Human Resources to determine the level of disciplinary action taken.

The Employer received a complaint in July of 2013 from an employee alleging there were activities by employees the complainant felt were wrong, including the misuse of government computers. The allegation was directed towards the security guards and their supervisors. The allegations prompted an investigation by the Employer. There are several different computers a guard utilizes during the day. A guard must log onto a computer before any information can be accessed. This creates a computer log showing the times

the employee was on the computer and what was viewed by the employee when he or she was logged into it. When the complaint was received the Employer had an IT person pull the logs for the security guards to check when each guard was on the computer and what was viewed by that guard.

The Employer can have its own employees in a separate department investigate employees for potential policy violations or it can refer the matter to the Washington State Police to investigate. There were a number of employees whose computer use the Employer believed could be improper. Most of the investigations of those employees were done in-house. Several received counseling or issued a written warning for excessive use of the computer. The Employer decided to have Grievant investigated by the State Patrol as it found several sites visited by Grievant which were potentially of a pornographic or sexually explicit nature.

Detective Hoyt from the State Patrol was assigned the case. He was given copies of logs from three different computers used by Grievant. It showed the sites Grievant viewed. One of the sites listed on the computer was "nudevista." The logs showed that a Google search of "Ghetto Strippers Tube Search" had been made. Nudevista appeared from that search. It was unclear whether nudevista was a popup from a site found from the search or had actually been directly accessed by Grievant. There were also numerous You Tube sites visited involving "twerking." That is a dance the Employer found to be sexually suggestive. Grievant and Ms. Doss were interviewed as part of the investigation. Grievant was shown the printouts and asked to review the names of the sites visited. He and his Union representative took about 20 minutes for

that purpose. Detective Hoyt had a copy of the logs in which he highlighted several sites, including nudevista. He showed the highlighted copy to Grievant after he had come back from reviewing the copies that had not been highlighted. Grievant was asked if he had viewed nudevista and he said he had for about 10 minutes. That site had actually been accessed after Grievant's shift had ended. He later questioned whether he was the one who had viewed it as he stated he does not stay past his shift, but goes straight home.

Detective Hoyt as part of his investigation looked at the nudevista web-site to determine what it contained. He was able to use a program to access what a site looked like in the past. Nudevista changes the content regularly so he wanted to see what it looked like when Grievant viewed it on May 9, 2013. He could not get that date, but was able to see what was on the site on May 10. He took a screen shot of the videos on the site and attached that screen shot to his investigative report. An employee of the Department had also accessed the site to see what was on it when getting ready to send the information to the Detective. He viewed the site in January of 2014. Both times there were pictures describing the videos. Those pictures showed nudity and individuals engaging in sexual acts.

Ronald M. Adler is the appointing authority. He was given the results of the investigation and the logs. He concluded Grievant had viewed pornographic material in violation of its zero tolerance policy. He also concluded the twerking videos were sexually explicit. He testified he considered Grievant's positive past history, but given the violation of the zero tolerance policy discharge was warranted. He sent a notice to Grievant on July 15, 2014 terminating his

employment effective July 15. The Notice listed the sites Adler felt violated the Policy. The Union then grieved the decision to terminate Grievant's employment.

DISCUSSION

The Employer has promulgated a rule limiting the personal use of its computers. The amount of time that can be spent doing personal business and the material that can be accessed is addressed in the Rule. Of particular concern is the use of the computer to view material that is pornographic or sexually explicit as defined in the rule. Such a rule is clearly reasonable. These sites can not only infect the computer system, but could also potentially expose the Employer to claims of sexual harassment by those who may be offended by such sites. The Union does not dispute the reasonableness of the rule and the Arbitrator finds the implementation of such a rule by the Employer to be within its rights and to be business related.

Grievant was provided a copy of the Rule, He indicated he may have only signed a receipt for it when given the Rule and not actually read it. Even if that were so, it would not excuse Grievant from the requirement to follow it. It is his choice whether to read the rule or not. The only obligation on the Employer when promulgating a rule is to provide notice, which is something it did.

The Employer decided to farm out the investigation to the State Police. An investigator was assigned and he obtained all the relevant material. He even checked some of the web sites listed, including the nudevista site. He then interviewed Grievant and gave him an opportunity to respond to the charges. The Arbitrator cannot find any fault with his investigation.

This then leaves only the questions of whether Grievant actually viewed sites that fell within the definition of pornography and/or sexually explicit material and if so whether discharge was the appropriate penalty for his acts, notwithstanding the zero tolerance provision. The Arbitrator first will address the former question.

The Detective was able to view the nudevista site as it existed only one day removed from the day Grievant saw it. It was also viewed a few months after that date. The site contained videos. Each video had a picture showing what was contained in that video. In both instances where the site was checked, the pictures showed a video that was unquestionably pornographic. They clearly fell within the definitions of pornography as they included “the explicit representation of the human body or sexual activity with the goal of sexual arousal and/or sexual relief.”

Grievant maintains on the day in question no such videos or pictures from the videos were contained on the site. Given what is seen on both days it is unrealistic to think on that particular day nothing like these videos was there. One must reasonably assume that if these videos were on the site on May 10 they were there in some form on May 9. Grievant did admit when questioned by the Detective that he did go to the nudevista site.² The records also show that to get to that site, a Google search for term “Ghetto Strippers Tube” was made. That search leads to numerous sexual sites, including nudvista. Simply using those search words inevitably leads to a pornographic site.

² During the same interview he also admitted viewing a site called teen strippers. He denies the site contained nudity, but the very title of the site would indicate otherwise. That search also results in a list of sites that are pornographic.

Though he admitted viewing the site when questioned by the Detective, he points out it was viewed after his shift ended and he leaves the facility immediately after his shift ends. He questions whether it was even him that viewed the site given the timing. The search was logged in under his access code. He certainly would not have left the facility without logging out first. Consequently, the Arbitrator finds Grievant did view the site and that the site contained pornographic material. Even if he did not open any of the videos, the pictures alone were pornographic and the search directly leads him to a site like nudevista.³ He had to be aware of that when initiating such a search.

Grievant was also charged with viewing sexually explicit material. Several Twerking videos were viewed. Mr. Adler concluded these videos fell within that definition. The Arbitrator, like Mr. Adler was unfamiliar with that term and had to familiarize himself with what it is. There is no nudity seen, but the dance is suggestive. To be sexually explicit according to the definition, the intent of the video or picture must be to “arouse sexual desire.” As the Union points out, many dances are suggestive, but that does not mean they are performed for that defined purpose. These sites should definitely not have been viewed at work as they are not of a nature that should be watched while at work, but the Arbitrator cannot say they conclusively fall within the definition.

Grievant and the Union concede Grievant erred in viewing what he did. They argue given his clean record, the penalty does not fit the crime. It noted others were involved in the investigation and received far lesser discipline. Counseling and oral reprimands were issued to many. The Union feels given

³ The Union argues the Arbitrator should apply a higher standard of proof than a preponderance of the evidence. The Arbitrator finds regardless of the standard applied, the evidence supports this finding.

those penalties this penalty is far too severe. The testimony of Employer witnesses was those disciplines were issued for excessive use of the internet rather than the content of what was viewed. There is no evidence any of the others who were issued lesser discipline viewed pornography. Here, it is the content which is in issue, not the viewing time. He was not charged with spending too much time on the internet. Given the absence of any evidence that would show others did what Grievant did and were issued a lesser form of discipline, the Arbitrator must reject that argument. The burden is on the Union to prove there has been disparate treatment. It has not met that burden.

The last issue to resolve is whether the discharge was too severe given Grievant's prior clean record. The Union contends there is no reason not to follow the progressive discipline steps described in the Agreement in this case. It argues the zero tolerance policy needs to be scrutinized before being applied. It cited a case from the Personnel Resources Board. In Gutterrez v. Department of Social and Human Services, the Board was asked to uphold the discharge of an employee who had viewed sexually explicit material. The zero tolerance policy applied then to that type of material as well as pornographic material. The employee had an otherwise clean record. The Board distinguished a case where a discharge was upheld of an employee with a long disciplinary history.⁴ In this case, it held:

The Board does not intend to negate the importance of Respondent's zero tolerance policy. However, the rigidity of the policy must be weighed against unique mitigating factors particular to this individual situation. In consideration of Appellant's length of service, his unblemished work history, and good performance evaluation and

⁴ Zimmeran v. Dept. of Labor PAB DISM-99-0032 (2000).

in keeping with the disciplinary sanction imposed in similar cases Appellant's dismissal should be modified to a suspension.⁵

There is a similarity between that case and this one. Grievant had an unblemished record and good evaluations. There is one difference, however. In Gutterrez, the Board found lesser penalties were imposed in similar cases. As noted, there is no evidence that is the case here. Conversely, there is a problem with the Employer argument that it has been consistent in applying the penalty of discharge when an employee has viewed pornography. It offered no examples of when it has done that. This Arbitrator recently had a case involving zero tolerance. The record included numerous specific examples where employees were discharged for the offense, even if it was a first offense. The Union never challenged any of those decisions. There is no evidence in this record of when this previously occurred and no evidence the Union ever acquiesced in the imposition of that penalty for this violation. In addition, as the Personnel Board noted the policy says the "most stringent disciplinary action" will be imposed. It does not say a violation will automatically result in discharge. There is discretion within the rule.

The Arbitrator must weigh the violation against the positive factors. While nudevista is a very pornographic site, it is the only site of that nature in the logs with the possible exception of teen strippers. If he viewed sites like this one on a regular basis, that would weigh more heavily against him than the isolated event that this is. While he did look at other questionable sites, they do not rise to the level of this single site. The Arbitrator also finds significant the

⁵ Arbitrator Escannilla also overturned a discharge of an employee who had viewed sexually explicit material. He found there was disparate treatment and progressive discipline should have been followed.

fact that it appears personal use of the computers was rampant, even by supervisors. They may not have looked at the same sites, but the culture allowing for frequent personal use was there, which resulted in numerous individuals being disciplined. When weighing all these pros and cons, including Grievnat's very positive work record, the Arbitrator finds progressive discipline should have been followed in this case. The Collective Bargaining Agreement favors progressive discipline where appropriate. It is appropriate in this case.

The Arbitrator does not mean to minimize what Grievant did. Pornography should never be viewed at work, especially when using the Employer's own computers. It does put those computers at risk of viruses and can expose the Employer to charges of creating an environment not conducive to the work place. In Gutterrez, the Personnel Board ordered reinstatement without backpay and a 15% reduction in pay. It is unclear exactly how long the employee had been off prior to the Board order, but it was not as long as it has been here. One would surmise given the hearing in that case took place five months after discharge that the employee was off 8-9 months. Of course, that employee also had his pay reduced. That is not something this Arbitrator will or can do. It has been over 18 months since Grievant was discharged. Ordering reinstatement without back pay is always difficult when this much time has elapsed. The Arbitrator finds he cannot order that strict a remedy in this case given the time lapse. A year without pay is a sufficient penalty. The discharge is overturned.

AWARD

1. The grievance is sustained in part and denied in part.
2. The discharge is overturned.
3. Grievant shall be reinstated and made whole from July 15, 2015, one year after the discharge, until offered reinstatement without loss of seniority or other benefits.
4. The Arbitrator shall retain jurisdiction for no less than 90 days to resolve any issues regarding the implementation of this Award.

Dated: February 29, 2016

A handwritten signature in cursive script, reading "Fredric R. Dichter", is written above a horizontal line.

Fredric R. Dichter, Arbitrator